85-235

No.

Supreme Court, U.S.
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CLERK

In the
Supreme Court of the United States
October Term, 1985

JAMES THRASHER,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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October, 1985

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE SAVING CLAUSE OF THE ILLINOIS SEX CRIMES ACT, ILL.REV.STAT., CH. 38, SECS. 12-18, DENIES THE PETITIONER EQUAL PROTECTION OF THE LAWS BECAUSE IT DENIES HIM THE OPPORTUNITY TO BE SENTENCED UNDER THE SEX CRIMES ACT EVEN THOUGH HE WAS SENTENCED, BUT NOT CONVICTED, AFTER THE EFFECTIVE DATE OF THAT ACT.

TABLE OF CONTENTS

	PAGE
Questions Presented for Review	i
Table of Authorities	iii
Opinions Below	1
Jurisdictional Statement	2
Constitutional Provisions and Statutes Involved	2
Statement of the Case	6
Reasons for Allowance of the Writ	8
Conclusion	13
Appendix	1a
Opinion of the Appellate Court of the Fourth Judicial District of the State of Illinois	1a
Order of the Illinois Supreme Court Denying the Petition for Leave to Appeal	5a

TABLE OF AUTHORITIES

PAGE

CASES

Levy v. *Louisiana*, 391 U.S. 68, *reh. denied*, 393 U.S. 898 (1968) 8

Rinaldi v. *Yeager*, 384 U.S. 305 (1966) 8

People v. *Palmore*, 113 Ill.App.3d 926, 446 N.E.2d 911 (1983) 12

People v. *Osborn*, 111 Ill.App.3d 1078, 444 N.E. 2d 1158 (1983) 12

People v. *Gibson*, 41 Ill.App.3d 209, 354 N.E.2d 71 (1976) 12

People v. *Jackson*, 112 Ill.App.3d 908, 445 N.E. 2d 1348 (1983) 12

United States ex rel. Scott v. *Illinois Parole and Pardon Board*, 669 F.2d 1185 (7th Cir. 1982) .. 9

STATUTES

United States Constitution, Amendment 14 12,13

ILL.REV.STAT., Ch. 38, Sec. 11-4(a) (1983) 9

ILL.REV.STAT., Ch. 38, Sec. 11-5(a) (1983) 9

ILL.REV.STAT., Ch. 38, Sec. 12-18 (1984 Supp.) 9-12

ILL.REV.STAT., Ch. 1, Sec. 1103 (1983) 12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No.

JAMES THRASHER,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

OPINIONS BELOW

On May 24, 1984, the jury returned a verdict of guilty against the Petitioner, James Thrasher, on four counts of indecent liberties with a child, ILL.REV.STAT., Ch. 38, Sec. 11-4(a) (1983), a felony; and two counts of contributing to the sexual delinquency of a minor, ILL.REV. STAT., Ch. 38, Sec. 11-5(a) (1983), a misdemeanor. On July 26, 1984, the court sentenced Thrasher to terms of four years imprisonment on each of the felony counts, and 364 days on each of the two misdemeanor counts, with the sentences to run concurrently.

On March 6, 1985, the Appellate Court of Illinois for the Fourth Appellate District affirmed the convictions. The Illinois Supreme Court denied Thrasher's Petition for Leave to Appeal on June 4, 1985.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under the provisions of United States Code, Title 28, Section 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

14th Amendment, United States Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Illinois Revised Statutes, Chapter 38, Section 11-4(a) (1983)

Indecent liberties with a child. (a) Any person of the age of 17 years and upwards commits indecent liberties with a child when he or she performs or submits to any of the following acts with a child under the age of 16:

(1) Any act of sexual intercourse; or
(2) Any act of deviate sexual conduct; or
(3) Any lewd fondling or touching of either the child or the person done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the person or both.

Illinois Revised Statutes, Chapter 38, Section 11-5(a)

Contributing to the Sexual Delinquency of a Child. (a) Any person of the age of 14 years and upwards who performs or submits to any of the following acts with any person under the age of 18 contributes to the sexual delinquency of a child:

(1) Any act of sexual intercourse; or
(2) Any act of deviate sexual conduct; or
(3) Any lewd fondling or touching of either the child or the person done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the person or both; or
(4) Any lewd act done in the presence of the child with the intent to arouse or to satisfy the sexual desires of either the person or the child or both.

Criminal Sexual Abuse. (a) The accused commits criminal sexual abuse if he or she:

(1) commits an act of sexual conduct by the use of force or threat of force; or
(2) commits an act of sexual conduct and the accused knew that the victim was unable to understand the nature of the act or was unable to give knowing consent.

(b) The accused commits criminal sexual abuse if:

(1) the accused was 17 years of age or over and commits an act of sexual penetration or sexual conduct with a victim who was at least 13 years of age but under 16 years of age when the act was committed; or
(2) the accused was under 17 years of age and commits an act of sexual penetration or sexual conduct with a victim who was at least 9 years of age but under 16 years of age when the act was committed.

(c) Sentence. Criminal sexual abuse is a Class A misdemeanor. A second or subsequent conviction for a violation of subsection (a) of this Section is a Class 2 felony. For purposes of this Section, it is a second or subsequent conviction if the accused has at any time been convicted under this Section or under any similar statute of this State or any other state for any offense involving sexual abuse or sexual assault that is substantially equivalent to or more serious than the sexual abuse prohibited under this Section.

Illinois Revised Statutes, Chapter 38, Section 12-12(e), (f)

Definitions. For the purposes of Sections 12-13 through 12-18 of this Code, the terms used in these Sections shall have the following meanings ascribed to them:

(e) "Sexual conduct" means any intentional or knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus or breast of the victim or the accused, or any part of the body of a child under 13 years of age, for the purpose of sexual gratification or arousal of the victim or the accused.

(f) "Sexual penetration" means any contact, however slight, between the sex organ of one person and the sex organ, mouth or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person, including but not limited to cunnilingus, fellatio or anal penetration. Evidence of emission of semen is not required to prove sexual penetration.

Illinois Revised Statutes, Chapter 38, Section 12-12, footnote (1984 Supp.)

Saving clause, construction. The abolition of any offense by this Act does not affect any prosecution pending,

penalty, punishment, disqualification from office or employment, forfeiture incurred, or rights, powers or remedies accrued under any law in effect immediately prior to the effective date of this amendatory Act of 1983, which related to the abolished offense. The provisions of this amendatory Act insofar as they are the same or substantially the same as those of any prior statute, shall be construed as a continuation of such a prior statute and not as a new enactment.

This amendatory Act of 1983 shall only apply to those persons who commit offenses prohibited under Sections 12-13 through 12-16 of the Criminal Code of 1961, as amended, on or after the effective date of this amendatory Act.

Illinois Revised Statutes, Chapter 1, Section 1103 (1983)

No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding. If any penalty, forfeiture or punishment be mitigated by any provision of a new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect. This section shall extend to all repeals, either by express words or by implication, whether the

repeal is in the act making any new provision upon the same subject or in any other act.

STATEMENT OF THE CASE

On June 9, 1983, the Grand Jury of McLean County, Illinois, returned an indictment against the Petitioner, James Thrasher, charging him *inter alia* with four counts of indecent liberties with a child under the provisions of ILL.REV.STAT., Ch. 38, Sec. 11-4(a) (1983); and two counts of contributing to the sexual delinquency of a child under the provisions of ILL.REV.STAT., Ch. 38, Sec. 11-5(a) (1983). On May 24, 1984, the jury returned a verdict of guilty on all counts. Indecent liberties with a child was defined as a Class 1 felony, and carried a minimum sentence of four years. Contributing to the sexual delinquency of a minor was a Class A misdemeanor, and carried a penalty of a term of less than one year. On July 26, 1984, the court sentenced Thrasher to 4 years of imprisonment on each felony count, to run concurrently, and 364 days of imprisonment on each of the two misdemeanor counts, to run concurrently with the felony sentence.

While the Petitioner was awaiting trial, the Illinois State Legislature passed a new Sex Crimes Act, ILL.REV. STAT., Ch. 38, Secs. 12-18 (1984 Supp.), which redefined sex-related crimes. Under the provisions of the new Act, Thrasher's crimes are lumped together under the single heading of criminal sexual abuse, defined as a Class A misdemeanor. The new Act came into effect on July 1, 1984, and contained a saving clause apparently stating it was to operate prospectively only. Thrasher was given no opportunity to be sentenced under the new Sex Crimes Act.

Thrasher appealed, asking for a new trial, or in the alternative remand for a new sentencing hearing with the opportunity to choose to be sentenced under the Sex Crimes Act. The equal protection argument was not raised either in the trial court or the Appellate Court. The Appellate Court denied his request for a new trial for reasons not relevant to this Petition. It denied his prayer for another sentencing under the provisions of the Sex Crimes Act on the grounds that the saving clause in the new Act barred application of the general statutory saving clause, ILL.REV.STAT., Ch. 11, Sec. 1103 (1983). It also stated that Section 1103 would not apply in any event because the Sex Crimes Act did not simply provide for a new sentencing, but redefined the nature of the crime. The sentencing provision of Section 1103 therefore did not apply.

Thrasher then filed a Petition for Leave to Appeal in the Illinois Supreme Court, which was denied on June 4, 1985. He raised the equal protection claim in his Petition to the Supreme Court. 28 U.S.C. SECTION 2403 may be applicable.

REASONS FOR THE ALLOWANCE OF THE WRIT

The Petitioner contends that he has been denied the equal protection of the laws by the saving clause to the Sex Crimes Act, ILL.REV.STAT., Ch. 38, Sections 12-12 to 18 (1984 Supp.). In evaluating an equal protection challenge to a statute, courts generally defer to legislative decisions in making classifications; *Levy* v. *Louisiana,* 391 U.S. 68, *reh. denied* 393 U.S. 898 (1968). But there must be some rationality in the nature of the class singled out; *Rinaldi* v. *Yeager,* 384 U.S. 305 (1966). The decision of the Illinois State Legislature to apply the new Sex Crimes Act prospectively only was an arbitrary and irrational action.

The highest state court to review James Thrasher's conviction, the Appellate Court for the Fourth Judicial District of Illinois, held that the saving clause to the Sex Crimes Act meant that the sentencing provisions of the new Act applied prospectively only. The effect of this ruling is to create three classes of individuals who committed sex crimes: 1) those whose cases reached final disposition before the effective date of the new Act; 2) those who committed acts after the new Act; and 3) an intermediate class of those whose acts came before the effective date of the new Act, but whose cases remained pending. This third class is unreasonably lumped together with the first class, rather than the second, where it belongs.

This is not a case in which an individual convicted of a crime, whose case has been finally decided, asks that he be sentenced under the provisions of an act passed

since his conviction. *See United States ex rel. Scott* v. *Illinois Parole and Pardon Board,* 669 F.2d 1185 (7th Cir. 1982). Rather, it involves a person who has been convicted, but not sentenced, before the effective date of a new statute. This is apparently a case of first impression.

The Sex Crimes Act redefined and reclassified sex crimes in the State of Illinois. Nonetheless, Thrasher's conduct, and the evidence necessary to prove it, are exactly the same under the new Act and the old law. Section 12-15, under which the defendant's conduct now falls, does redefine the offenses involved. Section 11-4 of the prior statute, which defined the crime of indecent liberties with a child, reads in pertinent part:

> 11-4. Indecent liberties with a child. (a) Any person of the age of 17 years and upwards commits indecent liberties with a child when he or she performs or submits to any of the following acts with a child under the age of 16:
>
> (1) Any act of sexual intercourse, or
>
> (2) Any act of deviate sexual conduct, or
>
> (3) Any lewd fondling or touching of either the child or the person done or submitted to with the intent to arouse or satisfy the sexual desires of either the child or the person or both.

Section 11-5 defines contributing to the delinquency of a child nearly in identical terms. It reads in pertinent part:

> 11-5. Contributing to the Sexual Delinquency of a Child. (a) Any person of the age of 14 years and upwards who performs or submits to any of the fol-

lowing acts with any person under the age of 18 contributes to the sexual delinquency of a child:

(1) Any act of sexual intercourse, or

(2) Any act of deviate sexual conduct, or

(3) Any lewd fondling or touching of either the person done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the person or both; or

(4) Any lewd act done in the presence of the child with the intent to arouse or to satisfy the sexual desires of either the person or the child or both.

The chief difference between the old and the new law concerns the ages of both the victims and the perpetrator. The new Act defines criminal sexual abuse as follows:

12-15. Criminal Sexual Abuse (a) The accused commits criminal sexual abuse if he or she:

(1) commits an act of sexual conduct by the use of force or threat of force; or

(2) commits an act of sexual conduct and the accused knew that the victim was unable to understand the nature of the act or was unable to give knowing consent.

(b) The accused commits criminal sexual abuse if:

(1) the accused was 17 years of age or over and commits an act of sexual penetration or sexual conduct with a victim who was at least 13 years of age but under 16 years of age when the act was committed; or

(2) the accused was under 17 years of age and commits an act of sexual penetration or sexual conduct with a victim who was at least 9 years of age but under 16 years of age when the act was committed.

The relevant definitions are given in Section 12-12(e) and (f):

> (e) "Sexual conduct" means any intentional or knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus or breast of the victim or the accused, or any part of the body of a child under 13 years of age, for the purpose of sexual gratification or arousal of the victim or the accused.
>
> (f) "Sexual penetration" means any contact, however slight, between the sex organ of one person and the sex organ, mouth or anus of another person, or any intrusion, however slight, or any part of the body of one person or of any animal or object into the sex organ or anus of another person, including but not limited to cunnilingus, fellatio or anal penetration. Evidence of emission of semen is not required to prove sexual penetration.

Although the words are different, the actual conduct involved is virtually identical. The only change between 11-14(a) (1-3) and 11-15(a) (1-3) on the one hand, and 12-15(b)(1) and (2) on the other, concern the age of the victim and the explicit definitions of the new Act that give more precision to deviate sexual conduct and lewd acts, and the incorporation of additional offenses under the definitional headings in each law that are not included in the other.

The Petitioner submits that making definitions more precise and incorporating additional offenses under the respective definitional headings does not make his actions into a new substantive offense. The conduct involved is exactly the same, and the evidence necessary to prove

that conduct has not changed. To call this a different substantive offense is to exalt form over substance.

Without the saving clause, Thrasher would have had the opportunity to be sentenced under the more general Illinois saving clause, ILL.REV.STAT., Ch. 1, Sec. 1103, which reads in pertinent part:

> If any penalty, forfeiture or punishment be mitigated by any provision of a new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect. This section shall extend to all appeals, either by express words or implication, whether the repeal is in the act making any provision upon the same subject or in any other act.

By the application of this section, James Thrasher would be placed within the class of those who have committed acts after the effective date of the Act. Yet the Legislature, by its arbitrary action in attaching the saving clause, has prevented this classification. This, we contend, is a violation of the Fourteenth Amendment.

It is true that the construction of Section 1103 is in some dispute. Illinois courts have disagreed on its application to particular statutes. *Compare People* v. *Palmore,* 113 Ill.App.3d 926, 446 N.E.2d 911 (1983) (change in demarcation between felony and misdemeanor) and *People* v. *Osborn,* 111 Ill.App.3d 1078, 444 N.E.2d 1158 (1983) (change in demarcation between felony and misdemeanor) with *People* v. *Gibson,* 41 Ill.App.3d 209, 354 N.E.2d 71 (1976) (involuntary manslaughter redefined to reckless homicide) and *People* v. *Jackson,* 112 Ill.App.3d 908, 445 N.E.2d 1348 (1983) (change in demarcation between felony and misdemeanor). Thus it is possible that Section

1103 would not apply in the absence of the saving clause. Even in that event, however, there has still been a violation of equal protection requirements.

The reason is that Thrasher's conduct, while identical in fact to the proscribed conduct in the older law, has simply been redescribed in somewhat different terms. The result would be that a simple redescription of the conduct in question would deprive him of the benefits of Section 1103. That in itself would be a violation of equal protection. There is no rational basis for this difference in result.

In summary, by adding the saving clause to the Sex Crimes Act, the Illinois State Legislature has arbitrarily deprived the Petitioner of his right to be sentenced under the provisions of Section 1103. There is no reason why the Legislature, by means of a simple redescription of his crime, should achieve this result.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

NO. 4-84-0541

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

JAMES THRASHER,
Defendant-Appellant.

Appeal from Circuit Court
County of McLean
No. 83CF187
Honorable Wayne C. Townley, Jr., Judge Presiding.

(Filed Mar 6 1985)

JUSTICE MILLS delivered the order of the court:

Thrasher was found guilty by a jury of indecent liberties with a child and contributing to the sexual delinquency of a child.. He performed sexual intercourse with his girlfriend's 14½-year-old daughter approximately twice a month—from December 1980 to May 1983—until the girl was 17.

Thrasher was sentenced to 4 years for indecent liberties and 364 days for contributing, to run concurrently.

On appeal, he contends (1) he should have been given the option to be sentenced under the law regarding sex offenses which was in effect at the time of sentencing, and (2) that the court erred in denying his pretrial demand for an additional bill of particulars.

We affirm.

I. Defendant was convicted on May 24, 1984, of committing indecent liberties with a child and contributing to

the sexual delinquency of a child. As of July 1, these crimes were statutorily repealed by the new "Sex Crimes Act." (Pub. Act 83-1067, 4 Ill. Legislative Service 7077 (1983).) He was sentenced on July 26, 1984, pursuant to the previous existing laws. Section 12-15 was enacted by Public Act 83-1067 and section 27 of the Act provides:

> "Saving clause, construction. The abolition of any offense by this Act does not affect any prosecution pending, penalty, punishment, disqualification from office or employment, forfeiture incurred, or rights, powers or remedies accrued under any law in effect immediately prior to the effective date of this amendatory Act of 1983, which related to the abolished offense. The provisions of this amendatory Act insofar as they are the same or substantially the same as those of any prior statute, shall be construed as a continuation of such a prior statute and not as a new enactment.
>
> This amendatory Act of 1983 shall only apply to those persons who commit offenses prohibited under Sections 12-13 through 12-16 of the Criminal Code of 1961, as amended, on or after the effective date of this amendatory Act."

This demonstrates that the legislature did not intend the sentencing provisions of the amendment to extend to offenses committed under prior law. (See *People* v. *J.S.* (1984), 103 Ill. 2d 395, 469 N.E.2d 1090.) Defendant is therefore not entitled to a new sentencing hearing under the new statute. See *People* v. *Gibson* (1976), 41 Ill. App. 3d 209, 354 N.E.2d 71.

Even if section 27 did not apply, the amendment here is not simply an amendment to the sentencing provisions which left the substantive offense unchanged. Instead, substantial changes were made in the nature of the offense using new definitions and terminology and adding new elements to certain of the sexual offenses such as use of a weapon, causing bodily harm, and commission of a fel-

ony. (See Ill. Rev. Stat., 1984 Supp., ch. 38, pars. 12-14 and 12-16.) In view of these substantive changes, it is inappropriate to use the new sentencing provisions for offenses committed under prior law.

No error.

II. Defendant also argues that an additional bill of particulars was required to establish with specificity the dates of the alleged criminal sexual acts. The minor victim testified extensively during trial, articulating approximate time frames within which the assaults occurred. In some instances, she was able to narrow down the period to a few days. But, for the most part, the specific dates were unknown. For example, she testified that defendant raped her on the following occasions: "Early December," "the week after semester exams," "probably 2 weeks later," "late February, early March," "early April," and "right before the 4th of July weekend." The record indicates that she was unable to recall specific dates throughout the 2½ years but that the defendant performed intercourse with her every two weeks or every month, excluding August 1981, for two years.

In *People* v. *Long* (1977), 55 Ill. App. 3d 764, 370 N.E. 2d 1315, this court decided a case where the victim was unable to pinpoint the exact dates she was sexually abused. The victim could only state that her stepfather engaged in the act of sexual intercourse at least once a month for a period over a year. We said:

> "Today, the primary goal in charging an offense is simplicity in order that the accused will be able to understand the charge against him. The time and place of the offense are separate and distinct from the more important requirement that the nature and elements of the offense be stated. (33 Ill. 2d 527, 533-34, 212 N.E.2d 97, 100; *People* v. *Mahle* (1974), 57 Ill. 2d 279, 283, 312 N.E.2d 267, 270; *People* v. *Gilmore* (1976), 63 Ill. 2d 23, 28-29, 344 N.E.2d 456, 459-

460.) *Blanchett* and its progeny, however, left the question presented in the instant case unanswered. While a bill of particulars cannot cure a void charge, it can be used to protect the defendant in a case in which he is unable to formulate his defense. Here, however, defendant contends that the State's bill of particulars was so inadequate as to prevent him from formulating an effective alibi defense." 55 Ill. App. 3d 764, 772, 370 N.E.2d 1315, 1321. We went on to say:

"If illicit acts which are repeatedly committed in the supposed security of the home by a parent against a child are to be effectively punished and deterred in accordance with our criminal laws, a degree of flexibility must be given to section 111-3(a)(4)'s requirement that the defendant be charged with having committed the offense on a certain date." 55 Ill. App. 3d 764, 772, 370 N.E.2d 1315, 1322.

Furthermore, defendant was not prejudiced in preparing his defense. He testified that he never remained at home during those periods of time when he allegedly committed the rapes and produced a logbook indicating he was out of town on certain occasions. He testified he almost always left home before the victim was awake. The victim's mother testified defendant left home before the girl was awake and friends of the defendant testifid he woke them up most every weekday morning between 6:30 and 7:00 — the time he was accused of raping the girl. He presented his alibi defense but has not indicated what, if any, alibi defense he would have produced had greater specificity been given had his motion for a bill of particulars been granted.

No error.

Affirmed.

WEBBER and McCULLOUGH, J.J., concur.

ILLINOIS SUPREME COURT
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June 4, 1985

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N. 61683 — People State of Illinois [sic], respondent, v. James Thrasher, petitioner. Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

Miller, J., took no part.

The mandate of this Court will issue to the Appellate Court on June 25, 1985.

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vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Fourth District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether petitioner's failure to raise in the state trial and appellate courts the constitutional claim now advanced before this Court precludes review of the claim?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW ...	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTIONAL STATEMENT	2
STATEMENT OF THE CASE	2
REASON FOR DENYING THE PETITION FOR WRIT OF CERTIORARI:	
PETITIONER'S FAILURE TO RAISE IN THE STATE TRIAL AND APPELLATE COURTS THE CONSTITUTIONAL CLAIM NOW ADVANCED BEFORE THIS COURT PRECLUDES REVIEW OF THE CLAIM	3
CONCLUSION	6

TABLE OF AUTHORITIES

Cases	PAGE
Crowell v. Randell, 10 Pet. 368 (1836)	5
Gates v. Illinois, 462 U.S. 213 (1983)	4
Hankerson v. North Carolina, 423 U.S. 233 (1977) ..	5
Michigan v. Tyler, 436 U.S. 499 (1978)	5
State Farm Mutual Automobile Insurance Co. v. Duel, 324 U.S. 154 (1945)	5
Tacon v. Arizona, 410 U.S. 351 (1973)	5

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JAMES THRASHER,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Fourth District

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The order of the Illinois Appellate Court, Fourth District, is unreported pursuant to Illinois Supreme Court Rule 23, Ill. Rev. Stat. ch. 110A, § 23. The order has been submitted to this Court as an Appendix to the Petition for Writ of Certiorari and, therefore, is not contained in this Brief in Opposition.

JURISDICTION

The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

Petitioner, James Thrasher, was convicted in the Circuit Court of the Eleventh Judicial Circuit, McLean County, on May 24, 1984, of indecent liberties with a child and contributing to the sexual delinquency of a child in violation of Ill. Rev. Stat. 1983, ch. 38, §§ 11-4(a) and 11-5(a) respectively. On July 1, 1984, these offenses were repealed by Public Act 83-1067. Ill. Rev. Stat. (Supp. 1984), ch. 38, §§ 11-1 to 11-5. In their place new offenses were enacted. Ill. Rev. Stat. (Supp. 1984), ch. 38, §§ 12-13 to 12-16. Petitioner on July 26, 1984, was sentenced under the old law to four years imprisonment for indecent liberties with a child and 364 days imprisonment for contributing to the sexual delinquency of a child in that section 27 of the new act provided:

> Savings clause, construction. The abolition of any offense by this Act does not affect any prosecution pending, penalty, punishment, disqualification from office or employment, forfeiture incurred, or rights, powers or remedies accrued under any law in effect immediately prior to the effective date of this amendatory Act of 1983, which related to the abolished offense. The provisions of this amendatory Act insofar as they are the same or substantially the same as those of any prior statute, shall be construed as a continuation of such a prior statute and not as a new enactment.

> This amendatory Act of 1983 shall only apply to those persons who commit offenses prohibited under Sections 12-13 through 12-16 of the Criminal Code of 1961, as amended, on or after the effective date of this amendatory Act.

Ill. Rev. Stat. (Supp. 1984), ch. 38, foll. § 12-12. The sentences were to run concurrently.

Petitioner appealed from a judgment of conviction to the Illinois Appellate Court, Fourth District. The court on March 6, 1985, affirmed the convictions in an unpublished order. Subsequently, petitioner filed a Petition for Leave to Appeal to the Illinois Supreme Court pursuant to Illinois Supreme Court Rule 315. Ill. Rev. Stat. ch. 110A, § 315. The Illinois Supreme Court on June 4, 1985, denied the petition.

REASON FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The respondent respectfully requests this Court to deny the Petition for Writ of Certiorari to review the decision of the Illinois appellate court.

PETITIONER'S FAILURE TO RAISE IN THE STATE TRIAL AND APPELLATE COURTS THE CONSTITUTIONAL CLAIM NOW ADVANCED BEFORE THIS COURT PRECLUDES REVIEW OF THE CLAIM.

Petitioner in support of his petition for a writ of certiorari claims "that he has been denied the equal protection of the laws by the saving clause of the Sex Crimes Act, Ill. Rev. Stat., Ch. 38, Sections 12-12 to 18 (1984 Supp.)". (Petition for Writ of Certiorari at 8) Under the

savings clause, petitioner was to be sentenced under the law in effect at the time of the commission of the offenses, rather than under the provisions of the Sex Crimes Act. However, on direct appeal to the Illinois appellate court petitioner simply argued that "he should have been given the option to be sentenced under the law regarding sex offenses which was in effect at the time of sentencing." (Petition for Writ of Certiorari, Appendix at 1a) It is interesting that petitioner would now advance an equal protection claim before this Court, when in the circuit and appellate courts of Illinois petitioner failed to raise the issue. Petitioner admits the failure in his Petition for Writ of Certiorari before this Court in his Statement of the Case: "The equal protection argument was not raised either in the trial court or the Appellate Court." (Petition for Writ of Certiorari at 7)

Most recently, in *Gates v. Illinois*, 462 U.S. 213 (1983), this Court, after receiving briefs and hearing oral argument on the application of the Fourth Amendment to a magistrate's issuance of a search warrant on the basis of a partially corroborated anonymous informant's tip, requested the parties to address an additional question for review:

> [W]hether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment, *Mapp v. Ohio*, 367 U.S. 643 . . . (1961); *Weeks v. United States*, 232 U.S. 383 . . . (1914), should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment.

Id. at 217. However, this Court held that it would not decide this later issue since it was not presented to or decided by the Illinois courts. This decision was made on

the basis of the rule that if both of the requirements that a federal question has been raised and decided in the state court below do not appear on the record, the jurisdiction of the Supreme Court fails. *Crowell v. Randell*, 10 Pet. 368, 391 (1836). This Court in *Gates* thus reaffirmed the jurisdictional character of the rule against deciding claims "not pressed nor passed upon" in state court as reflected in *State Farm Mutual Automobile Insurance Co. v. Duel*, 324 U.S. 154, 160 (1945). Such lack of jurisdiction accounts for the statement that this Court "cannot decide issue raised for the first time here." *Tacon v. Arizona*, 410 U.S. 351, 352 (1973).

Similarly, in *Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978), petitioner sought to advance before this Court the argument that respondent lacked standing to object to the unconstitutional searches and seizures. However, the Michigan Supreme Court had refused to consider this issue because the prosecution failed to raise the issue in the courts below. Consequently, this Court held that the failure to present a federal question in conformance with state procedure constituted an adequate and independent ground of decision barring review in this Court. Similar reasoning was employed by this Court in *Hankerson v. North Carolina*, 423 U.S. 233, 236 (1977). This Court held that a question raised in a petition for writ of certiorari would not be reached where the North Carolina Supreme Court held that the issue had not been "properly presented" to it.

In the case at bar, respondent maintains this Court should not grant the petition for writ of certiorari where the issue has not been preserved for review in the courts below. As in *Gates*, *Tyler*, and *Hankerson*, the failure of petitioner in the case at bar to preserve the issue for review, precludes review of the issue by this Court. Thus,

where the equal protection issue was neither pressed by the petitioner in the courts below, nor passed upon by those courts, this Court should deny the petition for writ of certiorari.

CONCLUSION

In view of the foregoing reasons, respondent respectfully requests the petition for writ of certiorari be denied.

Respectfully submitted,

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